

² This is claimant's second appeal in this matter and the second time he has failed to file any brief. In the future a brief would most certainly prove helpful. See K.A.R. 51-18-4(a)(1).

Respondent contends the ALJ's Order should be affirmed. Respondent argues that its entire payroll in either 2006 or 2007 (the year of claimant's accident) did not exceed the \$20,000 threshold. Thus, the Act does not apply. Respondent also argues that there is no coverage available for the claimant's date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second appearance for this claim before the Board. Claimant alleges he suffered an accidental injury on October 20, 2007. At the first presentation, the issues to be determined were whether the claimant had established that respondent's payroll was sufficient to invoke the provisions of the Act. The ALJ concluded that the Act did not apply because the evidence established that respondent had no payroll for 2006 (respondent did not yet exist) and in 2007, the payroll did not exceed \$5,258.10. Thus, based upon the provisions of K.S.A. 44-505, coverage was not triggered and benefits were denied.

That Order was appealed to the Board and the ALJ's conclusions were affirmed. The Board also noted that neither party had addressed the provisions of K.A.R. 51-11-6 which dictates that payroll paid by a corporation to all workers is to be included. Respondent is a family owned business, albeit a limited liability company, and the evidence presented at the first preliminary hearing did not include the amounts paid to family members. If monies paid to family members by the corporate respondent were included in the payroll amounts for 2007, it may be that the statutory payroll threshold would be met and coverage under the Act would be triggered.

A second preliminary hearing followed and during the course of that hearing, the payroll accountant for the respondent, Diana Poeschel, testified. She confirmed all the same figures for payroll that were previously offered. Total payroll for 2006 was 0, inasmuch as respondent had yet to come into existence. Respondent came into existence in October 2007 so the only payroll numbers available for 2007 were for the last quarter and the total payroll for that period was \$5,258.10. She further testified that the total payroll for the first 3 quarters of 2008 was \$15,537.52. And the projected payroll for the entire year was \$17,782.73.

The uncontroverted evidence, both from Ms. Poeschel and Tony Saroya, is that this business was purchased by the Saroya family in October 2007 and it was always their intention to phase out all non-family members and work the store themselves. After the initial period of ownership, all but one employee was terminated and it was a family run affair, except for a few hours per week by part-time employees. The salaries taken by the family members was limited and in light of the reversal of the economy, Mr. Saroya says that even his family members have gone without their pay. He further testified that no

dividends have been issued and the company has continued to lose money throughout 2008.

The ALJ considered the evidence and again denied claimant's claim finding that respondent's payroll does not meet the statutorily required \$20,000 threshold. The ALJ made no finding with respect to insurance coverage and as the Board did in the earlier appeal, that issue will not be addressed.³

This member of the Board has considered the additional testimony along with the earlier evidence and concludes the ALJ's Order should be affirmed.

It is claimant's burden to prove coverage under the Act and that burden necessarily includes the obligation to establish whether respondent has the requisite payroll requirements set forth in the Act. K.S.A. 44-505(a)(2) exempts from the Act the following employments:

(2) any employment, . . . wherein the employer had a . . . current calendar year of more than \$20,000 for all employees...

In order to avoid being subject to the provisions of the Act, the above statute establishes a two-pronged test. First, the employer must not have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than \$20,000 for all employees excluding family members. It is not entirely clear if the times encompassed by this statute are to be considered in light of the accident date or in light of the date the issue is being litigated. But in either event, the evidence is uncontroverted that the threshold was not or reasonably would not have been breached in any of the years, 2006, 2007 or in 2008.

Respondent had no payroll for the year preceding the accident (2006). And for 2007, the year of the accident, the year respondent was created and began paying a payroll, the total sum was less than \$6,000. Then, in 2008 the first 3 quarters yielded a payroll of \$15,537.53. The projected payroll for the entirety of 2008 was \$17,782.73, reflecting the respondent's intention to have the company run almost entirely by family members who would be willing to forego a paycheck. Thus, regardless of the year that is to be considered, the threshold does not exceed \$20,000.

Based upon questions posed by claimant's counsel at the second preliminary hearing, it may be claimant's contention that if you consider the payrolls from the last quarter of 2007 along with the first 3 quarters of 2008, the threshold of \$20,000 was met

³ Respondent contends there was no workers compensation policy in effect on the date of accident although a policy was eventually issued sometime thereafter.

and that coverage under the Act has been satisfied. However, there is no case law (nor a brief) to support this purported argument. Moreover, the provisions of the statute do not allow a litigant to cherry pick the favorable years or to reconfigure the calendar in order to satisfy the statutory criteria. The statute refers to calendar years and that term must be strictly interpreted.

For these reasons, the ALJ's Order is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 20, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Dallas Rakestraw, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁴ K.S.A. 44-534a.